



POLICE DEPARTMENT

August 19, 2009

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Nelson Vergara
Tax Registry 927635
33 Precinct
Disciplinary Case No. 82823/07

The above-named member of the Department appeared before me on July 17, 2009, charged with the following:

1. Said Police Officer Nelson Vergara, while assigned to the Military Extended Leave Desk, on or about and between June 1, 2005 and August 2006 (as amended) having been involved in a police incident, to wit: having been investigated and subsequently prosecuted by the Naval Criminal Investigative Service for numerous violations of the United States Code of Military Justice, did fail and neglect to report such investigation and prosecution to the Operations Unit, as required.

P.G. 212-32, Pages 1, Paragraph 1 AND 2 – OFF-DUTY INCIDENTS INVOLVING
UNIFORMED MEMBERS OF THE SERVICE

2. Said Police Officer Nelson Vergara, while assigned as indicated in Specification #1, on or about and between June 1, 2005 and August 2006 (as amended), did wrongfully engage in conduct prejudicial to the good order, efficiency and discipline of the Department, to wit: said Officer being the subject of an investigation conducted by the Naval Criminal Investigative Service did impede said investigation by misrepresenting material facts during his interview by the NCIS personnel.

P.G. 203-10, Pages 1, Paragraph 5 – PUBLIC CONTACT-PROHIBITED CONDUCT
GENERAL REGULATIONS

The Department was represented by Pamela Naples, Esq., Department Advocate's Office, and the Respondent was represented by Michael Martinez, Esq.

COURTESY • PROFESSIONALISM • RESPECT

The Respondent, through his counsel, entered a plea of Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

The Respondent, having pleaded Guilty, is found guilty.

SUMMARY OF EVIDENCE PRESENTED IN MITIGATION

The Respondent entered a plea of guilty to the specifications under oath. He indicated that he has never been the subject of disciplinary charges prior to this. He indicated that his military career began on January 2, 1995 when he went to boot camp for the Marine Corp. He was then assigned to the Third Battalion Second Marine in camp Lejeune, North Carolina.

The Respondent performed several deployments including Guantanamo Bay as part of a quick reaction force in Camp X-Ray as well as some of the camps during the lottery of Cuban immigrants. He was also part of Operation Dynamic Strike in Bosnia and that he also served in Kosovo. In 1998, after four years, he ended active service and moved to Buffalo. He began with this Department in August of 2000. He reenlisted with the Marine Corp in January 2003 for the initial Iraq operation, Iraqi Freedom.

The Respondent indicated that he reenlisted because of the impact of 9-11. He noted that he had been part of the recovery effort between his assignments at the 33 Precinct, working bucket brigades. He said he felt he was not doing his part and felt compelled to go back to active duty. He went to Nasiriyah, Iraq for eight months. He

was part of the initial wave of Task Force Terror. The Marines took one side of the country while the Army took the other. After eight months the war stopped and he was part of Task Force Finest doing police training in that province.

When he returned from active duty he was assigned to Manhattan Traffic Task Force. He spoke with Chief Scagnelli because he was interested in going back to patrol.

He was re-deployed into the military in 2005 and he went from North Carolina to Fallujah, Iraq where he was an Iraq Security Force police instructor as well as chief advisor for all police matters in Saqlawiyah, Iraq. He was in Iraq for about one year.

While there, he was interviewed by an NCIS investigator [REDACTED] in November of 2005. He had been on leave for two weeks and went for the interview on his return. The Respondent indicated that they discussed a wide variety of issues. He did not request an attorney although he knew he was entitled to have one. He also did not have to answer questions at that time.

The Respondent indicated that [REDACTED] was investigating conspiracy against the United States, bribery, larceny – he indicated these were the big items that “stuck in his head.” The Respondent indicated that [REDACTED] suspected that there was a weapons ring that was either illegally transporting weapons to the US or disposing of them unlawfully to interpreters and Iraqi citizens.

The Respondent indicated that at that time he was responsible for distributing and issuing weapons to Iraqi security forces, Marines as well as non-Marines. He was not the command authority and if he was going to issue a weapon he needed to request permission.

His supervisor at that time was Master Sergeant [REDACTED]. The Respondent indicated that at any given time they could have over 300 AK-47s as well as about 25 or 30 Berettas and even more Glocks. These weapons were distributed to those who worked directly with them or supported them. They were also distributed temporarily for marksmanship training.

He noted that not all the Marines had handguns and that [REDACTED] was authorized to issue them.

The Respondent indicated that he was acquainted with Lance Corporal [REDACTED] who was an inspector/postal clerk. He indicated that one day he went with [REDACTED] to the post office so [REDACTED] could send a package to the States. While [REDACTED] was at a table having his package inspected, [REDACTED] asked the Respondent if he knew [REDACTED]. At some point the Respondent conveyed to [REDACTED] that [REDACTED] had requested a firearm. [REDACTED] said "yeah sure it's not a problem" and the Respondent issued a firearm to [REDACTED]. Within a period of 24 hours [REDACTED] received an e-mail indicating that the weapon should be returned. The Respondent picked-up weapons from [REDACTED] and his sergeant, [REDACTED]. Both guns had been issued under the authority of [REDACTED] and both were returned within 24 hours. (The Respondent was not involved in issuing a weapon to [REDACTED]. Apparently, their supervisor did not deem it necessary for them to have these weapons.

During his four hour interview with the NCIS investigator the Respondent was asked if he had given weapons to [REDACTED] and [REDACTED] and the Respondent denied it.

The Respondent indicated that he did not want to get the two Marines involved in "what could potentially have blown up to be something out of proportion. It wasn't to my knowledge I didn't you know, it was a huge error in my judgment to have done that

and I am just really I am still upset about that. I just should have said it from the beginning but I didn't want to get them in trouble. Honestly I didn't think it was a big deal."

The Respondent indicated that he did not think they had done anything serious and he did not believe they were sending weapons back to the States or selling them on the black market. Indeed, they were returned within 24 hours.

The Respondent was interviewed about this again in a more formal setting when he returned to Camp Lejeune in North Carolina. During that interview, he indicated to the investigators that he had lied at the first interview. Subsequently, he received charges and at a Summary Court Martial, he pled guilty.

The Respondent indicated that a Summary Court Martial is less than a General Court Martial or a Special Court Martial and that the maximum penalties include reduction in rank, loss of pay or confinement to the Military Base. The Respondent indicated that he lost one month's pay, was restricted to base and he was reduced in rank from sergeant to corporal. He was Honorably Discharged shortly thereafter and he was given a code which would allow him to go back into the military if he wished. The Respondent was never incarcerated with regard to this matter.

The Respondent returned to this Department after his discharge and was assigned to the 33 Precinct after a brief re-training.

The Respondent indicated that he was not permitted to discuss the incident stating "As far as like disclosure I wasn't allowed to speak to of it and that was told to me by my chain of command and by counsel." It did not occur to the Respondent to notify the

Operation Desk of the NYPD while he was in Fallujah and he did not think he would be allowed to do so during that time period.

When asked by his counsel why he did not tell anyone at the NYPD that he had been accused of misconduct and the fact that he had pleaded guilty to it, the Respondent stated: "It's kind of like, I mean, I know it's a little more severe than getting a written up, from my understanding it was administrative form of punishment and it was supposed to be in-house thing through the Marine Corp and I honestly didn't see that it was necessary for me to advise the Department that I was involved in, you know, a trial and I was charged with, you know, such things. I mean I hardly didn't think it would have been an issue. I was trying to use my brain here it's almost like I get into a shooting in Iraq and I am not going to advise the Department," (T – 33).

The Respondent indicated that he was involved in numerous shootings in Iraq and did not report those. He indicated that he now "absolutely" realizes that any time an officer is accused of misconduct or anything inappropriate, that officer has to let the Department know.

The Respondent indicated that [REDACTED] was acquitted of all charges and that [REDACTED] was not charged with misconduct. The Respondent also indicated that no allegations of black market sale of guns or mailing of guns back to the US were substantiated to his knowledge and that the only kind of conviction that resulted was his Summary Court Martial.

The Respondent also indicated that he had given his counsel a number of documents reflecting on his evaluations and commendations while in the Marines, (these were later collectively received as Respondent's Exhibit A). The Respondent also

indicated that he has remained on full duty even after the Department learned about the charges against him in the Marine Corps.

On cross-examination, the Respondent agreed that he went to the Police Academy and learned about the Patrol Guide there, including the rule regarding the need to report off duty incidents. The Respondent indicated that he had been with the Department for three years prior to his deployment overseas. He indicated that he did serve the entire sentence imposed by the Court Martial.

The Respondent indicated that when he returned to the States he was told by his chain of command that there was a chance he could be re-interviewed and he accepted. He said that he accepted so that he could add to the omission from his first interview. He indicated that he did not correct the matter sooner because he did not get counsel until April or May of 2006. He indicated that he did not feel that way initially after the first interview because he was still involved in operations in Iraq until December.

The Respondent agreed that he was told during the first interview that he was entitled to have counsel and he chose not to at that time. He agreed that later he felt it was necessary. He reiterated that during the first interview, he told [REDACTED] that he had not issued a weapon to [REDACTED] when in fact he did.

On questioning by the Court, the Respondent indicated that [REDACTED] was a special agent. He indicated that [REDACTED] started the interview by telling him about his background and how he had just closed a big drug ring in Afghanistan and that he had once been an Army captain.

The Respondent indicated that he understood that he was a subject of the investigation but that [REDACTED] made it seem like it was not so much about him and that it was not him that they were after but his master sergeant ([REDACTED]).

The Respondent indicated that he left Iraq in January 2006 and the second interview at Camp Lejeune was some time in April.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined, see *Matter of Pell v. Board of Education*, 34 N.Y.2d 222, 240 (1974). The Respondent was appointed to the Department on September 29, 2000. Information from his personnel folder that was considered in making this penalty recommendation is contained in the attached confidential memorandum.

The Respondent is charged with two specifications arising from an incident that occurred in Fallujah, Iraq while he was serving as a sergeant with the United States Marines. The Respondent served as a police trainer and his superior, Master Sergeant [REDACTED] had the authority to issue hand guns. With the permission of [REDACTED], he issued a hand gun to Lance Corporal [REDACTED]. The next day the gun was returned.

Some time later, he was interviewed by an investigator for the NCIS conducting a broad investigation. He voluntarily participated in this four hour interview without counsel. During the interview, the Respondent denied issuing a hand gun to [REDACTED].

Subsequently, he was returned to the United States. At Camp Lejeune, he was re-interviewed by NCIS and admitted to his earlier lie. The Respondent was subject to a

court martial and penalized with a reduction in rank and loss of pay. He received an honorable discharge.

The Respondent is charged under Specification No. 1 with failing to report any of these matters to this Department. Specification No. 2 charges that he impeded an NCIS investigation.

Because he has pled guilty, the only issue in this case is punishment. The Department has recommended a penalty involving the loss of thirty (30) vacation days. The Respondent argues that no penalty should be imposed by the Department. In support of this position, the Respondent raised a number of arguments. His central argument is that he should be given consideration for his voluntary service in the military, his three tours of duty during times of conflict including his service in the Iraq war zone. A second key argument made by the Respondent, is that he has already been punished by the military for his transgression.

Striking an appropriate balance between the need to honor those who serve in the military and need to enforce discipline in the Department is an especially delicate task. No better example of this can be seen than in recent litigation regarding another member of the service. In that case, the Appellate Division of the Supreme Court set aside a penalty imposed by the Department citing, among other things, “petitioner’s several tours of active military duty, including a year in Afghanistan for which he was decorated...” *Gomez v. Kelly* 55 A.D.3d 305 decided October 2, 2008. That decision was reversed by the Court of Appeals and the original penalty imposed by the Department was restored, *Gomez v. Kelly*, 2009 NY Slip Op 5201; 2009 N.Y. LEXIS 2479, decided June 24, 2009.

This is not to say that an appropriate level of consideration should not be given to the Respondent's military service within the context of a penalty framed by the Department. To determine how this balance can be achieved, it is helpful to look at the charges and how the Department has dealt with similar charges in previous cases.

With regard to Specification No.2, the Respondent is charged with being the "subject" of an investigation and "impeding" that investigation. The Respondent admitted that he lied to the NCIS investigator when asked if he gave a hand gun to [REDACTED] during his interview in Fallujah.

While all cases vary based on their own unique facts, the Department does have several cases which deal with impeding an investigation including one that deals with an investigation by an outside agency.

In Disciplinary Case No. 80213/04, signed 03/20/06, a six year member with no prior disciplinary record forfeited 30 vacation days, ten suspension days and was place on one year dismissal-probation for interfering with a federal criminal investigation by making false statements to a Secret Service agent. In an attempt to enforce an arrest warrant, federal agents gained entry into an apartment that was occupied by the respondent in that case. Upon questioning, he told the agents that he did not know the subject of the warrant, when in fact the subject was his half-brother.

In Disciplinary Case No. 74677/99, approved 08/23/05, a nine year member with no prior disciplinary record forfeited 30 suspension days for neglecting to inform the Department that his brother had access to a vehicle that had been involved in a hit and run accident. The Respondent in that case knew that this Department was investigating the accident but withheld the information because he wanted to protect his brother and

avoid becoming a witness against him. In the penalty recommendation, the hearing officer noted that he was not including a recommendation of dismissal probation because the respondent in that case had been on modified assignment for five years during the pendency of the charges.

In Disciplinary Case No. 77182/01, approved 05/31/04, an eleven year member with no prior disciplinary record having pleaded guilty, forfeited 30 vacation days and was placed on dismissal probation for impeding an investigation. The Respondent in that case gave imprecise answers to an investigator in hopes of distancing himself from an incident under investigation. He claimed to not clearly recall where he was in relation to the other participants in the event. He also failed to recall meeting with the participants and discussing the incident the next day.

Respondent Vergara is also charged, under Specification No. 1, with failing to report the investigation and prosecution to the Department. Penalties for failing to report have ranged from five to ten days for this offense, see Disciplinary Case Nos. 71486/96, signed May 20, 1998; 74223/99, signed January 3, 2000; 80914/05, signed 08/08/06; 78048/02, signed 03/14/05; and 79304/03, signed 10/13/04.

There is clearly Department precedent in cases of this type and it would appear that the penalty imposed in the past has been greater than that recommended by the Department in this case. It is clear therefore, that the penalty recommended by the Department already reflects a significant level of consideration for the Respondent's service to his country.

While it could be argued that the Respondent's false answers were not germane to the central issues in the investigation in Fallujah, we really don't know that and there is

simply no way of knowing where the investigation might have gone had the correct information been provided in a timely fashion. In the end, the direct false answer to a question in a criminal investigation is just the conduct penalized in the above cited Departmental cases.

The Respondent has raised some issues of confidentiality, ie: that he was not to discuss the investigation by others including his attorney. This, of course, would be a defense and the Respondent has pled guilty. Obviously, the Respondent realizes that he could have sought permission from the investigators and/or his chain of command to notify the NYPD and thus has not perused that defense. Clearly, the directives not to discuss the matter were not the reason for the failure to report to this Department.

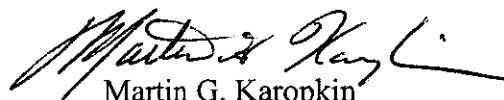
Certainly, the failure to report this matter to the Department as charged in Specification No. 1 is particularly troublesome. While calling the NYPD operations desk from a war zone might not have been the first thing on his mind at the time of the first interview, calling from North Carolina should have been somewhere in the Respondent's consciousness when the second interview occurred and he admitted to wrongdoing or when charges were filed. Certainly, after a Summary Court Martial convicted him and imposed a penalty, neither distance nor confidentiality should have stood in the way of a call. A conviction by a military court martial of whatever level is obviously something that needs to be reported.

The Respondent has also argued that he has already been punished for his misconduct. It is true that the military did impose a penalty on the Respondent however, the responsibility that the Respondent owes to this Department is separate and apart from that which he owed to the military. During his service in the military, the Respondent

remained a member of this Department and he has returned to his police duties within this Department. It is wholly appropriate that this Department address these issues as they relate to this Department.

Under all of the circumstances, this Court recommends that a penalty of thirty (30) vacation days, as recommended by the Department, be imposed.

Respectfully submitted,


Martin G. Karopkin
Deputy Commissioner – Trials

APPROVED

SEP 24 2009
RAYMOND W. KELLY
POLICE COMMISSIONER

**POLICE DEPARTMENT
CITY OF NEW YORK**

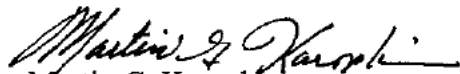
From: Deputy Commissioner - Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
POLICE OFFICER NELSON VERGARA
TAX REGISTRY NO.: 927635
DISCIPLINARY CASE NO.: 82823/07

The Respondent received ratings of 4.0—"Highly Competent," 3.5—between "Competent," and "Highly Competent," and 4.0—"Highly Competent" on his last three performance evaluations in 2006, 2007 and 2008. In his almost 9 years of service, the Respondent [REDACTED]

[REDACTED] He has one medal for Excellent Police Duty.

The Respondent has no prior formal disciplinary history.

For your consideration.


Martin G. Karopkin
Deputy Commissioner – Trials